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Supreme Court of the United States

OCTOBER TERM, 1968

No. 830

CAPTAIN DALE E. NOYD,

Petitioner,

—v.—

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighting Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on October 30, 1968.

Opinions Below

The Court of Appeals for the Tenth Circuit reversed the decision of the United States District Court for the District of New Mexico, Hon. H. Vearle Payne, Chief Judge, presiding, in an opinion which is not yet reported, and is printed in the Appendix, *infra,* p. 1a. The opinion of the District Court is reported at 285 F. Supp. 785 (D. N. Mex. 1968), and is printed in the Appendix, *infra,* p. 7a.

Jurisdiction

The judgment of the Court of Appeals was entered on October 30, 1968. Jurisdiction is conferred on this Court pursuant to 28 U. S. C. §1254(1).

Questions Presented

1. Where a military prisoner is ordered into confinement to commence serving a court-martial sentence, in apparent violation of a provision of the Uniform Code of Military Justice which forbids execution of such sentence until after the completion of military appellate review, is a Federal court deprived of habeas corpus jurisdiction by the doctrine of exhaustion of military remedies?

2. Can a military prisoner be ordered into confinement to commence serving a court-martial sentence of one year's confinement prior to the completion of military appellate review in the face of Article 71(c) of the UCMJ which forbids execution of such sentence until after the completion of military review?

3. Petitioner is an Air Force officer who became a conscientious objector after 11 years of honorable service, and whose application for classification as a conscientious objector and either separation or reassignment to duties not conflicting with his conscience, was denied by the Secretary of the Air Force. Judicial review of the denial of his application was declined by the U. S. District Court for the District of Colorado and by the 10th Circuit on the grounds of exhaustion of military remedies, such courts holding that wrongful denial could be raised as a defense to any ensuing court-martial for disobedience of an order. This Court denied certiorari. At the ensuing general court-martial, petitioner was convicted of disobedience and sentenced to dismissal, total forfeiture of all pay and allowances, and confinement for one year. In such court-martial proceeding and in the review thereof by an Air Force Board of Review, jurisdiction to consider petitioner's defense based on wrongful denial of conscientious objection was again declined, the Board of Review holding that only the Federal courts had jurisdiction to remedy erroneous administrative action by the Secretary of the Air Force. Although UCMJ, Article 71(c) forbids execution of any sentence involving confinement of one year or more prior to the completion of military appellate review, petitioner was ordered into confinement by respondents "pending completion of appellate review."

(a) Under these circumstances has petitioner been deprived of his liberty without due process of law in that he has been tried, convicted, sentenced, and ordered into confinement before there has been any hearing on the merits of his case?

(b) Is the 10th Circuit's reversal of the District Court's partial grant of habeas corpus, again on grounds of exhaustion of military remedies, an unconstitutional suspension of the writ of habeas corpus?

Constitutional and Statutory Provisions Involved

Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Article I, Section 9(2):

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28 U. S. C. §2241(a):

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

Uniform Code of Military Justice, Art. 71(c); 10 U. S. C. §871(c):

> "(c) No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

Statement of the Case

Petitioner, a Captain in the United States Air Force, was convicted on March 8, 1968 by a General Court-Martial at Cannon Air Force Base, Clovis, New Mexico, of violating Article 90 of the Uniform Code of Military Justice. Article 90 proscribes the willful disobedience of a lawful order. The order which Captain Noyd, a former fighter pilot, was accused of disobeying was that he fly an instructional mission with a student pilot in order to train him for combat duty in Vietnam. Petitioner's principal defense was that, prior to the order in question, he had made application for separation or reassignment as a conscientious objector, that such application had been wrongfully denied by the Secretary of the Air Force pursuant to an error of law, and that such error of law tainted the subsequent order to train the student pilot and rendered it illegal. The essential error of law made by the Secretary, and the underlying substantive question in all of the Noyd litigation[1] is that Captain Noyd was deemed disqualified

[1] The first case was the unsuccessful effort to secure pre-court martial judicial review of the denial of his application, *Noyd* v. *McNamara*, 267 F. Supp. 701 (D. Colo. 1967), aff'd 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967). Next came the court-martial proceedings, *U. S.* v. *Noyd*, ACM 20121, —— CMR ——. This case, *Noyd* v. *Bond, supra*, was instituted in an effort to prevent the unlawful execution of Capt. Noyd's sentence of one year's confinement prior to completion of appellate review.

because he was a discriminating pacifist rather than a universal pacifist.

On March 9, 1968, he was sentenced to dismissal from the service, forfeiture of all pay and allowances and one year's confinement. Immediately following his sentence, petitioner was ordered confined to his quarters pending appeal by order of respondent Colonel Doerr, the Base Commander of Cannon Air Force Base. On May 10, 1968, the General Court-Martial convening authority, the respondent General Bond, approved the conviction and sentence and ordered petitioner confined at the United States Disciplinary Barracks, Fort Leavenworth, Kansas "pending completion of appellate review." [Headquarters, Twelfth Air Force (TAC), General Court-Martial Order No. 13 dated 10 May 1968 (hereinafter "GCMO13")]. GCMO13 is printed in the Appendix, *infra*, p. 13a, see *infra*, p. 14a.

Pursuant to military law, petitioner was entitled to appellate review of his conviction by an Air Force Board of Review and further review, on petition for grant of review, by the United States Court of Military Appeals. On September 3, 1968, an Air Force Board of Review upheld petitioner's conviction, ruling that it lacked jurisdiction to review whether the Secretary had acted unlawfully. *United States* v. *Noyd*, ACM 20121, —— CMR ——. The opinion of the Air Force Board of Review has not yet been reported. It is printed in the Appendix, *infra*, p. 15a. Captain Noyd's petition for grant of review to the Court of Military Appeals was filed on November 22, 1968, and is currently pending.

The only judge thus far to rule on the merits of Captain Noyd's defenses was sufficiently moved to issue a preliminary injunction restraining the Air Force from placing Captain Noyd in a position where he would be compelled to

disobey an order. *Noyd* v. *McNamara,* —— F. Supp. —— (D. Colo., Mar. 29, 1967) *per* Judge Doyle. This decision by Judge Doyle has not yet been reported. It is printed in the Appendix, *infra,* p. 28a. Judge Doyle subsequently invoked the doctrine of exhaustion of military remedies and ruled that the merits of Captain Noyd's legal defenses must be passed upon by the military courts prior to consideration by the Federal District Court. *Noyd* v. *McNamara,* 267 F. Supp. 701 (D. Colo. 1967), aff'd 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967). Unfortunately, the military courts have, thus far, declined to pass upon those defenses. See Appendix, *infra,* pp. 20a-23a.

Nevertheless, Captain Noyd has been in physical confinement since March 9, 1968, pending appellate review of his conviction. Not content with confinement to his quarters at Cannon Air Force Base, the respondent General Bond, ordered Captain Noyd confined to the United States Disciplinary Barracks at Fort Leavenworth, Kansas pending the results of his appeal. (GCMO 13). The order of confinement to Leavenworth led to the filing of a petition for a writ of habeas corpus in the United States District Court for the District of New Mexico. Only the order of the Federal District Court, entered on May 24, 1968, has prevented the execution of the Leavenworth confinement order.

Chief Judge Payne, in his decision in the District Court, recognized that any attempt to jail Captain Noyd prior to the completion of military appellate review would constitute a clear violation of Article 71(c) of the Uniform Code of Military Justice, since Article 71(c) forbids execution of a sentence which includes confinement of one year or more, prior to the completion of appellate review. Accordingly, he invalidated the attempt to incarcerate Captain Noyd at

Fort Leavenworth pending the completion of appellate review, 285 F. Supp. 785. See Appendix, *infra*, p. 12a.

Both sides appealed Judge Payne's decision to the Court of Appeals. Petitioner appealed from so much of Judge Payne's decision as declined to order his complete release from confinement pending completion of military appeals. Respondents appealed from so much of the decision of the District Court as partially granted the writ.

The Court of Appeals ruled below, however, that the District Court lacked the power to relieve petitioner from premature confinement at Leavenworth pending appeal because petitioner had "failed to exhaust his military remedies." The District Court was reversed. Opinion below, p. 6, *infra*, p. 6a.

This petition for certiorari seeks reversal of the decision of the Court of Appeals, and reinstatement of the decision of the District Court. It further seeks a direction to the District Court to modify its decision and order, and to direct the granting of the original habeas corpus petition in full.

Simultaneously with this petition for certiorari, petitioner is filing with the Circuit Justice an application for release from confinement pending certiorari.

Following Judge Payne's decision, the respondent Doerr ordered petitioner moved from his family quarters, to which he had previously been confined, to a room in a bachelor officer's quarters. The conditions of his confinement since then have remained substantially the same. They include: absolute restriction to his room except for authorized exits, at specific hours, and in each case with prior notification to

Security Police, to obtain meals and to take care of personal needs; restriction of exercise to one weekly period of 1½ hours; restriction of visiting by his wife and two infant children to two weekly visits of two hours each; all non-family visiting is restricted to one weekly one-hour period; a large sign is affixed to his door which reads "Off Limits to Military Personnel".

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals decided important questions of Federal law which have not been but should be settled by this Court, and also because the jurisdictional holding of the Court of Appeals appears to conflict with applicable rulings of other Courts of Appeals.

POINT I

The Court of Appeals improperly applied the doctrine of exhaustion of military remedies, and thereby deprived petitioner of Federal habeas corpus relief, which is the only adequate, effective and practical remedy available. Its narrow jurisdictional holding is in conflict with decisions of other Courts of Appeals.

The Court of Appeals did not rule on the merits of petitioner's claim that he was ordered incarcerated in violation of military law.[2] Citing one Supreme Court decision, *Gusik*

[2] However, the citation by the Court of Appeals of three decisions of military Boards of Review, *U. S.* v. *Smith*, 2 CMR 817 (1952); *U. S.* v. *Banes*, 3 CMR 550 (1952); and *U. S.* v. *Lucero*, 18 CMR 942 (1955), all of which uphold petitioner's contention that such confinement is unlawful, strongly suggests that the Court of Appeals agreed with the District Court on the merits. See discussion of merits in Point II, *infra*.

v. *Schilder*, 340 U. S. 128 (1950), and a number of its own prior decisions, it declined jurisdiction on the grounds that petitioner had not exhausted all possible military remedies.[3]

(a) Inadequacy and ineffectiveness of suggested military remedies.

The possible military remedies which the Court below noted included review by an Air Force Board of Review;[4] further review, upon grant of petition therefor, by the Court of Military Appeals; and application for an extraordinary writ to the Court of Military Appeals.

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[3] The Tenth Circuit stated it to be "well established . . . that habeas corpus is not available to review military confinement until after all remedies afforded by the UCMJ have first been exhausted." Opinion below, p. 5, Appendix, *infra*, p. 4a. But in *Gusik* v. *Schilder*, *supra*, this Court's declination of jurisdiction on grounds of non-exhaustion was in response to a petition which sought review of various errors in the court-martial proceedings. *Gusik* was not, as is this case, an attack on the lawfulness of the confinement, unconnected with any possible trial errors. It may indeed be "well established" that habeas corpus is not available to review military *trials* until after exhaustion. But see argument, *infra*, at pp. 14-17. However, petitioner respectfully suggests that it is not at all well established that the bare question of military *confinement* itself—uncoupled with a collateral attack on judicial proceedings resulting in confinement—is not amenable to Federal habeas corpus. In any event, this Court has never so held in *Gusik* or in any other decision. Moreover, the decision below that a Federal court is powerless, pre-exhaustion, to redress a violation of Article 71(c) of the UCMJ is a case of first impression.

[4] The Court below's observation that the Board of Review had heard oral argument but not yet rendered its decision is inaccurate. Oral argument before the Board of Review was on August 22, 1968; its decision was handed down on September 3, 1968. Argument before the Court below was on October 2, 1968, and its decision was filed on October 30, 1968.

None of these suggested remedies can provide the adequate, effective and practical relief which is available through Federal habeas corpus. In the Board of Review decisions cited by the Court below, relief was indeed granted, but only after varying periods of unlawful incarceration while awaiting decision. In *U. S.* v. *Smith*, 2 CMR 817 (1952), the intervening period was 5½ months; in *U. S.* v. *Ranes*, 3 CMR 550 (1952), it was 2½ months; in this case, had the Board of Review reversed, it would have meant that petitioner would have nonetheless been illegally confined from March 9, 1968 to September 3, 1968, almost six months of a one-year sentence.

Federal habeas corpus relief, on the other hand, can be and in this case was, instantaneous and effective. GCMO 13, the Leavenworth confinement order, was issued May 10, 1968. Petitioner promptly obtained a show cause order from the District Court, which contained a stay. Briefs were presented, the matter was heard, and the Court rendered its decision on May 24, 1968, fourteen days after the confinement order.

The length of the record, the complexity of the issues, and the technical problems of preparing for a full appellate review on the merits are all factors which will bear on the length of illegal incarceration, if this were to be the only remedy. Utilization of this remedy would tend to pressure counsel for an unlawfully incarcerated accused to press for speedy review on the question of confinement and not take the time to adequately review, research and prepare for the other questions.

For obvious reasons, awaiting review on the merits by the Court of Military Appeals could not possibly produce

relief, in most cases, until approximately a year after conviction.[5]

The third suggested military remedy is the application for an extraordinary writ to the Court of Military Appeals in the light of its holding in *Levy* v. *Resor*, 37 CMR 399 (1967), that it has jurisdiction to hear such writs. But the Court below, we respectfully contend, overlooked a number of serious practical difficulties which would be created by establishing the Court of Military Appeals as the exclusive forum within which a military prisoner may challenge the lawfulness of his detention pending appeal:

(1) A jurisdictional requirement which funnels virtually all military habeas corpus applications through the Court of Military Appeals would place an extraordinary strain upon the facilities of that Court. The Court of Military Appeals is a three judge appellate tribunal. It lacks both the facilities and the manpower to accommodate the vast increase in evidentiary hearings which such a jurisdictional rule would entail. At the present time, the Court is obliged by the pressure of cases to regulate its appellate caseload by the judicious use of its discretionary power to grant review "upon petition of the accused and on good cause shown" UCMJ, Art. 67(b)(3); 10 U. S. C. §867(b)(3). To the extent that the Court is burdened as the primary forum from which military habeas corpus petitions must be launched, it will be correspondingly less able to fulfill its primary role of appellate tribunal.

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[5] The court-martial record of the five-day trial in this case consists of 402 pages, plus several hundred unnumbered pages of exhibits. Petitioner filed his petition for grant of review on November 22, 1968. If review is granted, by the time briefs are filed, oral argument is heard, and decision is rendered, Captain Noyd's one-year term will probably be over, even without giving effect to provisions for time off for good behavior.

(2) The very nature of a *habeas corpus* writ requires the presence of the petitioner at his hearing. However, it would be extremely impracticable for military authorities to transport prisoners great distances to Washington, D. C. to appear before the Court of Military Appeals.

(3) It will be virtually impossible for military prisoners to secure civilian counsel to initiate a writ in the Court of Military Appeals. It would be prohibitively expensive for a military prisoner detained in New Mexico or Hawaii, for example, to secure civilian counsel willing to travel to Washington, D. C. in order to initiate a habeas corpus proceeding.

(4) The Court of Military Appeals does not sit during the summer months. The very fact that the Court of Military Appeals recesses for the summer indicates that it does not view itself as the exclusive forum within which to initiate a habeas corpus writ challenging the legality of military detention.

As Chief Judge Payne observed in the District Court:

> ". . . the circumstances present here are such as to render the military remedy process ineffective to protect the petitioner's rights." 285 F. Supp. at 788. *Infra*, p. 11a.

This Court should grant certiorari, and reverse the decision below, because its narrow jurisdictional position, if allowed to stand, will have the effect of denying meaningful relief to large numbers of military prisoners.[6]

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[6] The United States Disciplinary Barracks at Fort Leavenworth, Kansas and many Air Force bases are located within the Tenth Circuit.

The relief sought by petitioner, if granted by this Court, will not be in circumvention of the military appellate process, but rather in support of it. What meaning is there to military appellate review if an accused languishes in confinement during its pendency, and when he is ultimately declared to have been unjustly convicted, his term has already been served? If there is here a lacuna in the administration of military justice, possibly susceptible of cure by legislation,[7] in the interim only Federal habeas corpus can provide effective justice and preserve the integrity of the military appellate process.

(b) Questionable applicability of exhaustion doctrine.

The only justification offered by the Tenth Circuit for its holding is the reinvocation of the doctrine of exhaustion of military remedies. It is questionable, however, if the doctrin is as monolithic as the Court below suggests. The doctrine as asserted in *Gusik* v. *Schilder,* 340 U. S. 128 (1950),[8] does not appear to have been reaffirmed by this Court in the succeeding eighteen years, notwithstanding

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[7] *Cf.* §2(24) of the Military Justice Act of 1968, which amends Article 54(a) of the UCMJ to allow discretionary deferment of the service of a sentence of confinement pending appellate review. The amendment becomes effective "on the first day of the tenth month following in the month in which it was enacted." §4(a). 37 U. S. Law W. 27, 29, 30.

[8] *Gusik* may very well be explained by the extraordinary conditions of military justice revealed in many of the early post-World War II cases. See *Servicemen in Civilian Courts,* 76 Yale L. J. 380, 383-385 (1966). A great public outcry against large-scale abuses led ultimately to the enactment of the Uniform Code of Military Justice in 1950. But one of the stopgap measures enacted by Congress was an amendment to the Articles of War which gave the Judge Advocate General of each service vast power to order new trials and grant other relief. Faced with this specific recent expression of congressional intent, it is not difficult to understand a judicial reluctance to disregard the new remedy.

many opportunities to do so. In *U. S. ex rel. Guagliardo* v. *McElroy*, 259 F. 2d 927 (D. C. Cir. 1958), aff'd 361 U. S. 281 (1960), the Court of Appeals held that the *Gusik* doctrine was of necessity greatly weakened by this Court's decisions in *Reid* v. *Covert*, 354 U. S. 1 (1957) and *U. S. ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955), and the Court concluded that *Gusik* must be limited to attempts "to attack collaterally a court-martial judgment because of alleged errors in the court-marital proceedings." 259 F. 2d at 929.[9] Obviously petitioner in this case does not seek habeas corpus to attack the many errors which he believes occurred in his court-martial proceedings. He is content to exhaust all his military remedies for the redress of those errors. Habeas corpus is sought so that if these errors are redressed in military channels, he will not have been deprived of this redress by intervening confinement.

There is little difference conceptually if the remedy which one is told he must exhaust prior to judicial review is an "administrative" remedy, or a "state court" remedy, or a "military" remedy. The wooden application of the doctrine can often have the effect, as in this case, of rendering a right remediless.

Indeed, it is now universally recognized that the doctrine that administrative remedies must be exhausted before resorting to the courts is not a rule of constitutional or even of statutory dimensions. It came into being simply as a point of judicial policy and convenience adopted by the courts and will not be applied in a hidebound fashion. This

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[9] *Accord*: *Neary* v. *Greenough*, 120 F. Supp. 833, 838 (D. Maine 1954); see *In re Yokoyama*, 170 F. Supp. 467 (S. D. Calif. 1959); *U. S. ex rel. Guagliardo* v. *McElroy*, 158 F. Supp. 171, 173 (D. D. C. 1958); see also *Caputo* v. *Sharp*, 282 F. Supp. 362 (E. D. Pa. 1968); *Peck* v. *Carpenter*, 120 F. Supp. 560 (N. D. Calif. 1954).

judge-made rule will be disregarded if there is good reason for making an exception. See *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300 (1937); *Lockhart* v. *U. S.,* —— F. 2d ——, 37 U. S. Law W. 2269 (9th Cir., Oct. 23, 1968). "The statement that courts so often repeat in their opinions—that judicial relief must be denied until administrative remedies have been exhausted—is seriously at variance with the holdings." 3 Davis, *Administrative Law Treatise,* §20.01, at 56 (1958).

A major exception to the doctrine of exhaustion is recognized where it is clear that the administrative remedy is inadequate, as is the military remedy in this case. This Court applied such exception last term in the case of *NLRB* v. *Marine Workers,* 391 U. S. 418 (1968). See also *Greene* v. *U. S.,* 376 U. S. 149 (1964); *McNeese* v. *Board of Education,* 373 U. S. 668 (1963); 3 Davis, *supra,* §20.07.

Furthermore, this Court has refused to apply the doctrine of exhaustion where the administrative remedy is inadequate or ineffective because of the harm which would result due to delay on the part of the administrative agency. See *Smith* v. *Illinois Bell Telephone Co.,* 270 U. S. 587, 591-592 (1926) ("Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates").

A second major exception to the doctrine of exhaustion has been applied by this Court where legal questions are presented which are of the type traditionally determined by courts and there is no requirement of administrative expertise. In *Gonzales* v. *Williams,* 192 U. S. 1 (1904), where the sole question before the Department of Immigration and Naturalization was whether or not the petitioner was an "alien", this Court held that there was no

requirement of exhaustion. Similarly, this Court, in *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456 (1943), denied the applicability of the doctrine in a case attacking a state commission's orders as invalid, saying:

> "No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act." *Id.* at 469.

See also *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557 (1919); *U. S.* v. *Watkins*, 163 F. 2d 328 (2d Cir. 1947); *Lee County School District No. 1* v. *Gardner*, 263 F. Supp. 26 (D. S. C. 1967).

There are, in any event, increasing indications that this Court and other courts are critically examining the appropriateness of the invocation of the doctrine and its often harmful consequences. In *Fay* v. *Noia*, 372 U. S. 391 (1963) it was held that the doctrine of exhaustion of state remedies would not be allowed to defeat the manifest federal policy that federal constitutional rights cannot be denied without a full opportunity for federal judicial scrutiny.[10]

(c) Conflict between the circuits.

It is not surprising therefore that a conflict has developed between the circuits, or the question of whether the doctrine of exhaustion precludes Federal habeas corpus for American military personnel.

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[10] Likewise, the doctrine of exhaustion is held inapplicable to suits brought under the Civil Rights Act, 42 U. S. C. §1983 (1964). See *Damico* v. *California*, 389 U. S. 416 (1967); *McNeese* v. *Board of Education, supra; Monroe* v. *Pape*, 365 U. S. 167 (1961).

In *Noyd* v. *McNamara,* 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967), and again in *Noyd* v. *Bond,* below, the Court of Appeals for the Tenth Circuit adopted an extraordinarily restrictive view of the power and duty of the Federal courts in this area. The Tenth Circuit, in *Noyd* v. *McNamara, supra,* declined to rule on the merits of Captain Noyd's substantive defenses prior to his court-martial, and now in *Noyd* v. *Bond,* has prevented a Federal District Court from enjoining petitioner's premature incarceration pending appeal.

In *Hammond* v. *Lenfest,* 398 F. 2d 705 (2d Cir. 1968), however, the Second Circuit adopted a jurisdictional position squarely at variance with that of the Tenth Circuit. In *Hammond* v. *Lenfest, supra,* the Second Circuit ruled that a serviceman was not obliged to submit to a court-martial prior to raising his defense of conscientious objection in a Federal court. In so holding, the majority explicitly rejected the reasoning of the Tenth Circuit in *Noyd* v. *McNamara.* See also, *U. S. ex rel. Mankiewicz* v. *Ray,* 399 F. 2d 900 (2d Cir. 1968).

In *In re Kelly,* —— F. 2d ——, 37 U. S. Law W. 2165 (5th Cir., Aug. 30, 1968), the Fifth Circuit also explicitly rejected the reasoning of the Tenth Circuit in *Noyd* and chose to adopt the reasoning of the Second Circuit in *Hammond.* The Fifth Circuit stated:

> "In Noyd v. McNamara, 267 F. Supp. 701 (D. Colo. 1967), aff'd 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967), the Tenth Circuit considered the courts were without jurisdiction to entertain the suit pending exhaustion of military justice procedures. In Hammond v. Lenfest, 36 U. S. Law W. 2765 (2d

Cir., June 10, 1968), the Second Circuit, in a 2-1 decision, rejected Noyd and went the other way . . .

"We view the requirement of exhaustion as did the majority in Hammond. . . ."

See also *Powers* v. *Powers*, 400 F. 2d 438 (5th Cir. 1968); *Brown* v. *McNamara*, 387 F. 2d 150, 153, n. 5 (3d Cir. 1967), cert. den. 390 U. S. 1005 (1968).

Thus, a sharp conflict between the circuits exists as to the nature and extent of the duty of the Federal courts to entertain applications for writs of habeas corpus challenging the legality of military detention. In view of the extraordinary importance attached to the writ of habeas corpus as "the great writ of liberty",[11] petitioner respectfully urges that this Court issue a writ of certiorari to the Court of Appeals for the Tenth Circuit in order to clarify the delicate question of when, and under what circumstances, civilian courts may entertain applications for writs of habeas corpus challenging the legality of military detention.

In addition, the restrictive jurisdictional position of the Tenth Circuit ignored a well-established body of case law which upholds Federal habeas corpus jurisdiction to review the propriety of military post-conviction restraint. *Gibbs* v. *Blackwell*, 354 F. 2d 469 (5th Cir. 1965); *Levy* v.

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[11] The Chief Justice has observed that:

"When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of civilian courts almost inevitable is drawn into question." Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181, 188 (1962).

Resor, —— F. Supp. —— (D. S. C. 1967), aff'd 384 F. 2d 689 (4th Cir. 1967), cert. den. 389 U. S. 1049 (1967); *Levy* v. *Dillon*, —— F. Supp. —— (L-543, D. Kans., July 29, 1968); see *Green* v. *Schilder*, 162 F. 2d 803 (10th Cir. 1947); *Kelly* v. *Hunter*, 80 F. Supp. 851 (D. Kans. 1948); *Sweet* v. *Taylor*, 178 F. Supp. 456 (D. Kans. 1959).

Finally, the Tenth Circuit's jurisdictional position casts doubt upon the well-established procedure of submitting to induction and challenging the validity of the induction order by an application for a writ of habeas corpus to the appropriate Federal District Court. See *Gibson* v. *U. S.*, 329 U. S. 338, 359 (1946); *Watkins* v. *Ruppert*, 224 F. 2d 47 (2d Cir. 1955). According to the rationale of the Tenth Circuit, such applications may not be heard in a Federal Court until the applicants have exhausted every conceivable military forum, including court-martial proceedings. See *Noyd* v. *McNamara, supra.* Such a result would be an unconstitutional suspension of the writ of habeas corpus. See *Gusik* v. *Schilder, supra*, 340 U. S. at 132; *Hammond* v. *Lenfest, supra*, 398 F. 2d at 713-714.[12]

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[12] By its characterization of military law as a "separate judicial establishment", Opinion below, p. 5, *infra*, p. 5a, the Tenth Circuit seems to be dealing with the concept of comity. However, comity is not a doctrine which asserts lack of power in jurisdictional terms, but merely a doctrine relating to the propriety of the exercise of power. Comity arises from the discretionary respect which one sovereign entity entertains for the acts of another. Consequently, no principle of comity can act to bar a Federal Court from inquiring into the lawfulness of the detention of any person by an instrumentality of the Federal Government itself. The military establishment is plainly not a sovereign entity. Judicial reluctance to entertain habeas corpus on misplaced notions of comity should be overruled by this Court.

POINT II

The incarceration of petitioner pending the completion of military appellate review is in acknowledged violation of the Uniform Code of Military Justice.

Article 71(c) of the Uniform Code of Military Justice, 10 U. S. C. §871, provides:

> "No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

Since petitioner was sentenced to one year's confinement and dismissal from the service, he clearly falls within the provisions of Article 71(c). Insofar as the "dismissal" aspects of his sentence are concerned, respondents have chosen to comply with Article 71(c) and have made no attempt to execute the dismissal. However, in disregard of the wording of Article 71(c), respondents have confined petitioner to quarters since March 9, 1968, and they seek to intensify his incarceration by attempting to imprison him in the United States Disciplinary Barracks at Fort Leavenworth, Kansas "pending the completion of appellate review," GCMO 13.

The District Court held, in its partial grant of the writ, that:

> "It is the opinion of the Court that placing the petitioner in Fort Leavenworth would, in effect, constitute, in part at least, execution of the sentence." 285 F. Supp. at 787. *Infra*, p. 9a.

Indeed, it would be difficult to conceive of a more effective "execution" of the confinement aspects of petitioner's sentence.[13]

In the numerous instances when this issue has arisen, military appellate tribunals have held that Article 71(c) prohibits the execution of a sentence of one year's confinement until the completion of appellate review.

In *U. S.* v. *Smith,* 2 CMR 817 (1952), the defendant was sentenced by a court-martial to one year's imprisonment and a bad conduct discharge. The convening authority approved the sentence and ordered the defendant to the United States Disciplinary Barracks at Cumberland, Pennsylvania, suspending only the bad conduct discharge pending appellate review. The Board of Review stated:

> "The action of the convening authority insofar as it purports to order into execution that portion of the approved sentence involving confinement, unsuspended, for twelve months is void." *Id.* at 822.

In *U. S.* v. *Ranes,* 3 CMR 550 (1952), *pet. for rev. den.* 3 CMR 150, the Air Force Board of Review was faced with a defendant who had been sentenced to a dishonorable discharge and confinement to the Base Guardhouse at Reese Air Force Base for one year. The convening authority approved the confinement and ordered it executed. The Air Force Board of Review stated:

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[13] The official review of the court-martial prepared by the Staff Judge Advocate of the convening authority (the respondent Bond) and concurred in and adopted by the respondent Bond explicitly designated the United States Disciplinary Barracks at Fort Leavenworth, Kansas as the "place of confinement."

"... the sentence of the court included confinement for one year and the convening authority purported to order this sentence into execution, suspending only the execution of the dishonorable discharge. The UCMJ, Article 71(c) provides, 'No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals.' The same prohibition is contained in §98 of the Manual for Courts Martial and is implicit in §88(d) of the Manual for Courts Martial ... Therefore, that part of the action of the convening authority purporting to direct execution of the sentence is illegal." *Id.* at 551.

The cases of *U. S.* v. *Sarae,* 9 CMR 633 (1953) and *U. S.* v. *Lucero,* 18 CMR 942 (1955) provide an excellent insight into the operation of Article 71(c) upon sentences of one year or more. In both cases, the defendants were convicted by court-martial and sentenced to a substantial fine, or, imprisonment of one year. In *Sarae,* the convening authority approved the sentence and ordered the confinement executed until the fine was paid. The Board of Review held that since the one year's confinement was not punitive, but merely to compel payment of a fine, 71(c) did not prohibit execution of confinement prior to appellate review. In *Lucero,* however, the Board reversed its decision in *Sarae,* and stated:

"It is inescapable that where there is the possibility that the sentence may extend to a year or more, the sentence may not be executed by the convening author-

ity until appropriate appellate review has been completed." *Id.* at 943.[14]

In *U. S.* v. *Hightower,* 14 CMR 908 (1954), the defendant was sentenced by a court-martial to one year's confinement and a dishonorable discharge. The convening authority approved the sentence and ordered it into execution. The Board stated:

> "The action of the convening authority in this case purports to order the sentence into execution. Since the sentence extended to a dishonorable discharge, total forfeitures and confinement at hard labor for one year, it cannot be ordered into execution until appellate review has been completed. Therefore, so much of the action as purports to order the sentence into execution is illegal, void and a nullity." *Id.* at 911.

In *U. S.* v. *Johnson,* 15 CMR 583 (1954), the Court stated:

> "So much of the action of the convening authority as purports to direct execution of the punishment of confinement and forfeitures is a nullity, since Article 71(c) of the Code forbids an order of execution as to any part of a sentence which includes confinement for one year or more until sentence has been affirmed by a Board of Review and . . . the Court of Military Appeals." *Id.* at 584.

Since Johnson's conviction was affirmed on the merits, it was held that no prejudice inured by virtue of the pre-

[14] The Court of Appeals, in its citation of the *Smith, Ranes,* and *Lucero* decisions, apparently agrees with this plain reading of Article 71(c). Opinion below, p. 6, *infra,* p. 5a.

mature execution of his sentence. However, in this case, the question of premature execution was raised at the inception of the appellate process. Therefore, the prejudice to petitioner is readily apparent, since even if he is ultimately successful on appeal, he would, nevertheless, have served the major portion of his sentence in illegal confinement.

On numerous other occasions, military courts have recognized that execution of a sentence of one year or more prior to appellate review is prohibited by Article 71(c) UCMJ. See, e.g., *U. S.* v. *O'Malley,* 1 CMR 469 (1951); *U. S.* v. *Duggins,* 1 CMR 539 (1951); *U. S.* v. *Johnston,* 2 CMR 759 (1952); *U. S.* v. *Mayer,* 3 CMR 667 (1952); *U. S.* v. *Ansell,* 16 CMR 450 (1954); *U. S.* v. *Williams,* 16 CMR 717 (1954); *U. S.* v. *Mason,* 16 CMR 795 (1954); *U. S.* v. *Garcia,* 17 CMR 88 (1954); *U. S.* v. *Doyle,* 17 CMR 542 (1954); *U. S.* v. *Emerson,* 20 CMR 434 (1954); *U. S.* v. *Lock,* 36 CMR 72 (1965).

We are thus faced with an issue of military law which has been consistently and uniformly determined in petitioner's favor by the military courts. The clear state of the military law on the subject renders the jurisdictional position of the Tenth Circuit even more difficult to comprehend. If a difficult and abstruse issue which had not been passed upon by any military court were present, a more compelling argument for "exhaustion" could be made. However, when faced with a well-settled proposition of military law, there is no justification for invoking the dubious doctrine of exhaustion and thereby frustrating the effective enjoyment of a right to be free. This Court should grant certiorari and declare its disfavor of what is in effect an abdication of judicial responsibility.

POINT III

The continued incarceration of Captain Noyd pending the completion of the military appellate process would deprive him of his liberty without due process of law in that no tribunal—civilian or military—has ever passed upon the merits of his defense.

Absolutely fundamental to a rational view of due process of law is the concept that no person may be sentenced *prior* to a hearing on his defense. However, by an unfortunate interaction between (1) *Noyd* v. *McNamara, supra;* (2) a violation of Article 71(c) of the Uniform Code of Military Justice; and (3) *Noyd* v. *Bond, supra,* Captain Noyd has been condemned to serve virtually his entire sentence to confinement *prior* to his receiving any hearing on the merits of his constitutional defenses. A brief summary of Captain Noyd's strange odyssey through the courts demonstrates that although he has served approximately nine months of his sentence, no court, civilian or military, has ever accepted jurisdiction and ruled on the merits of his defenses.

Initially, Captain Noyd approached the United States District Court in Denver, Colorado in March, 1967, when he was an Assistant Professor of Psychology at the Air Force Academy. Captain Noyd explained that he believed his application for conscientious objector status had been unconstitutionally and unlawfully rejected by the Air Force and that he was about to receive an order which would violate his religious beliefs. Judge Doyle initially granted a preliminary injunction, staying the Air Force from placing Captain Noyd in a position where he would be forced to disobey such an order. *Noyd* v. *McNamara,* —— F. Supp.

—— (Mar. 29, 1967). See Appendix, *infra*, p. 30a. However, several weeks later, Judge Doyle dissolved the injunction and dismissed the complaint, ruling that Captain Noyd should submit his defense to a court-martial before seeking the aid of a Federal District court. Judge Doyle's opinion was affirmed by the Tenth Circuit, which held that Captain Noyd "has not exhausted the military process and has not been denied, nor can we anticipate that he will be denied, a full consideration of his constitutional rights within the complete scope of that process." 378 F. 2d 538, 539-540 (10th Cir. 1967). This Court denied certiorari, 389 U. S. 1022 (1967). In the Memorandum in Opposition to the grant of certiorari, the Solicitor General of the United States argued:

> ". . . if and when petitioner is actually confronted with an order and charged with disobedience of it, he will have the opportunity to present his defenses within the traditional framework of court-martial procedures, review boards, resort to the service Secretary, and request for relief from the Court of Military Appeals." *Memorandum for the United States in Opposition*, p. 4.

Shortly thereafter, petitioner was indeed confronted with an order which conflicted with his conscience, charged with disobedience and found himself before a General Court-Martial at Cannon Air Force Base, Clovis, New Mexico. Captain Noyd attempted most strenuously to present his constitutional defenses to his court-martial. But the Law Officer ruled that, notwithstanding the understanding of the Tenth Circuit and the assurances of the Solicitor General, a military court-martial did not possess jurisdiction to determine petitioner's defenses. See *U. S.* v. *Noyd*, Record of Trial, p. 327.

The decision of the court-martial was affirmed by an Air Force Board of Review, which also disclaimed the power to determine petitioner's constitutional defense. In its decision the Air Force Board of Review stated:

> "Our decision in ACM 20016, *Dunn*, —— CM12 ——, decided May, 1968, answers the contention that the Secretary of the Air Force made an error of law in denying the accused's applications under AFR 35-24 for classification as a conscientious objector. In *Dunn*, the defense likewise demanded a judicial review within the court martial system of a Secretarial determination that the accused was not entitled to an administrative discharge as a conscientious objector. We held:
>
> > 'The obvious answer is that such judicial review was not within the jurisdiction of the court martial which tried the accused. The jurisdiction of a court martial is a very limited jurisdiction derived from the power of the Congress, in Article I, Section 8, Clause 14, of the Constitution To make Rules for the Government and Regulation of the land and naval Forces.' [citation omitted]
>
> "'. . . it is the Federal, not the military, courts which have jurisdiction in a proper case to review proceedings under such military regulations to determine whether there has been substantive due process." [citations omitted][15] *U. S.* v. *Noyd, infra,* p. 21a.

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[15] The Board cited with approval *Hammond* v. *Lenfest,* 398 F. 2d 705 (2d Cir. 1968) which rejected the reasoning and disagreed with the holding of the Tenth Circuit in *Noyd* v. *McNamara, supra.*

Thus, while the civilian and military courts have mutually and respectfully deferred to each other, "as nimbly as if dancing a quadrille," *Orloff* v. *Willoughby*, 345 U. S. 83, 87 (1953), petitioner was ordered to serve his sentence at Fort Leavenworth *before* any court passes upon the merits of his defenses. Petitioner has been subjected to an exercise in judicial frustration which may be summarized as follows:

(1) the refusal of the Tenth Circuit to permit a decision on the merits of his case until the military courts have acted—*Noyd* v. *McNamara*, 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967);

(2) the refusal of the military courts to render a decision on the merits of his case because they feel they lack the power to do so—*U. S.* v. *Noyd*, ACM 20121, —— CMR ——, *infra*, pp. 20a-23a;

(3) the insistence of the military authorities upon incarcerating petitioner at Fort Leavenworth pending the completion of the military appellate process—GCMO 13, *infra*, p. 14a; and

(4) the refusal of the Tenth Circuit to permit Federal habeas corpus review to prevent petitioner's unlawful incarceration pending appeal—*Noyd* v. *Bond*, —— F. 2d ——, *infra*, pp. 1a-6a.

Petitioner, therefore, has been sentenced to serve a year in confinement, and will in fact, serve that year, without *any* tribunal ever having passed upon the merits of his

defense,[16] unless this Court grants certiorari and orders him released pending certiorari.[17]

The responsibility of the Federal Courts to prevent the occurrence of the bizzare procedural dilemma in which petitioner has been placed is manifest. Petitioner respectfully urges this Court to grant certiorari in order to relieve him from the burden of being obligated to serve his sentence *prior* to receiving any hearing on the merits of his defense. At the same time a grant of certiorari will clarify the broader question of the power of the military to incarcerate a prisoner pending appeal, under any circumstances where military courts refuse to consider legal defenses on asserted grounds of lack of jurisdiction.

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[16] Presumably the doctrine of exhaustion of military remedies will no longer be applicable after the Court of Military Appeals rules, and it may then be possible to obtain judicial review on the merits. Cf. *Burns* v. *Wilson*, 346 U. S. 137 (1953). But by that time the one-year sentence will have been served.

[17] Simultaneously with this petition, petitioner has filed an application for release from confinement pending certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

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